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CHAPTER 17

Land Use Law

RICHARD G. HUBER

A. ZONING

§17.1. Special permits: Site plan approval. Municipalities are recognizing that flexibility is required in zoning, and that although the standard Euclidean type of zoning can provide an adequate zoning base, it cannot handle the multiplicity of cases that arise within a community. The major reliance on the variance as a device to alter zoning regulations has passed, at least in this Commonwealth, because the standards for the grant of a variance are very narrow and the courts in recent years have been carefully enforcing them.[1] The amending process, although necessary in cases involving substantial changes, takes considerable time and, under the Zoning Enabling Act, often proves difficult.[2] The special permit device has thus developed as the tool by which communities can control development quite simply and with considerable flexibility. The increasing use of the device has naturally resulted in a rapid increase in the number of cases involving what occasionally become quite sophisticated variations of the original rather simple permit.

One variation of the special permit has been site plan approval. Under this type of ordinance or by-law, the permit can be issued only if the development of the tract meets the standards set out in the zoning regulations to the satisfaction of the local body that is delegated this responsibility. Standards are set not merely in terms of specific factors but often in terms of the zoning purposes and goals of the municipality within the district in which the permit is authorized. Site plan approval also underlies the concepts of cluster zoning and planned unit developments which will become increasingly important as our urban populations increase rapidly over the next decades. Despite the not uncommon use of site plan approval in local ordinances and by-laws, however, it was only during the 1970

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§17.1. [1] G.L., c. 40A, §15(3); see discussions in 1969 Ann. Surv. Mass. Law §14.7; 1956 id. §§1.2, 13.2.

[2] G.L., c. 40A, §7. Requirements of public hearings and a more than majority vote for an amendment create a substantial part of the problem. Of course, alterations in zoning also disappoint the expectations of those who have depended on the zoning pattern, and this factor must be considered in determining if the rezoning is constitutionally valid. See 1968 Ann. Surv. Mass. Law §12.2.

SURVEY year that the Supreme Judicial Court sustained this type of permit.

In *Y. D. Dugout, Inc. v. Board of Appeals of Canton*,[3] the board had refused to grant site plan approval, under its local by-laws, to a proposed use of a lot for a new commercial building. Local zoning permitted the restaurant use of the proposed building as of right in the district, but required site plan approval for the construction or external enlargement of a commercial building. Standards set out in the by-law required the board, consistent with a reasonable use of the premises for permitted purposes, to consider the protection of the neighbors, feasibility of the proposed use in connection with traffic and safety, the solution of water drainage and sewerage problems and provision for any necessary loading areas.

Dugout owned an adjoining smaller building where it was presently conducting its business, about which neighbors had complained in the past, and which contributed to serious traffic congestion on the adjoining street. The board, in acting upon the site plan request, found that the congestion would be increased and that protection of the neighborhood from noise, loud music and drunkards would not be adequate. Thus the site plan was disapproved.

On an appeal by Dugout, the Superior Court ruled, in setting aside the board's decision, that the site plan approval provisions of the Canton by-law could not properly be enacted under the Zoning Enabling Act. The Supreme Judicial Court reversed, upholding site plan approval provisions of the type represented by this by-law. The Court pointed out that Canton could have, in effect, zoned the present locus for residence and could have had a provision allowing commercial use upon application for a special permit, thus making all nonresidential use a matter of special permit. This type of arrangement, subject to the requirement of adequate standards, would be the standard type of special permit. The Court thus concluded that the by-law could be interpreted as stating the general rules for commercial buildings and uses, and as allowing a permit for commercial building construction to be granted only upon the board's determination of compliance with the other pertinent provisions of the by-laws. Reasonably flexible means of adjusting zoning in accordance with sufficiently stated standards have been upheld. The Court found the present by-law, in substance, similar to those sustained in earlier cases under Sections 2 and 4 of the Zoning Enabling Act, stating that matters of substance as well as of form are to be considered.[4]

This decision does not, of course, broadly approve all site plan approval legislation, but its emphasis on substance rather than form should assure that the device will be available as an excellent, intelligent and effective way of regulatory development. The rather obvious

[3] 1970 Mass. Adv. Sh. 201, 255 N.E.2d 732.
[4] Id. at 206, 255 N.E.2d at 736.

willingness of the Court to support this type of control will encourage municipalities to proceed with confidence in developing flexibility within the somewhat rigid zoning patterns.

Although the Court upheld the Canton by-law, it did not allow the board's original decision to stand. Quoting the by-law, the Court noted that the provisions were designed to protect the public interest and that this suggested regulation rather than prohibition. At the least, the Court concluded, on the facts of the present case, the site plan approval provisions were designed to allow only the imposition of reasonable conditions. The case thus went back to the board for reconsideration. The language of the Court, however, does not suggest that it is limiting its rather broad support of site plan approval, since its determination of this point involved interpretation of the local Canton by-law.

§17.2. Special permits: Discretion to deny. In *MacGibbon v. Board of Appeals of Duxbury*[1] the Supreme Judicial Court for the second time considered the validity of the board's denial to the plaintiff of a special permit to fill and excavate certain shore lots. MacGibbon's original request to the board had been denied on the basis that " '[the plaintiffs] have presented no evidence that . . . [their] land could, in fact, be filled and used for residential purposes without constituting a hazard to the health of the community.' "[2] The Superior Court held that this original decision of the board did not exceed its authority, but the Supreme Judicial Court reversed because the denial of the permit was not responsive to the petition. The Court had concluded that "[i]n so far as the permit is sought for the purpose of filling and excavating land, it ought not to be denied on the basis that the land is unsuitable for residential construction. . . ."[3] On remand to the board of appeals, the plaintiff limited his request to one-seventh of the land included in the original petition and supplied engineering reports showing the feasibility of the landfill project. The board of appeals again denied the permit, this time basing its decision primarily on a 1960 amendment to the Duxbury zoning by-laws.[4] The Superior Court held that the board's decision was within its authority, and again the plaintiff appealed from the decree.

The basic thrust of the town's argument was twofold, positing first that the courts should not try to second-guess the town as to the expediency or purpose of its zoning by-laws, and second, that the town

§17.2. [1] 1970 Mass. Adv. Sh. 81, 255 N.E.2d 347.

[2] MacGibbon v. Board of Appeals of Duxbury, 347 Mass. 690, 691, 200 N.E.2d 254, 255 (1964).

[3] Id. at 692, 200 N.E.2d at 256, noted in 1964 Ann. Surv. Mass. Law §14.2.

[4] The provision added was as follows: ". . . [The by-law] is also for the purpose of protecting and preserving from despoilation the natural features and resources of the town, such as salt marshes, wetlands, brooks and ponds. No obstruction of streams or tidal rivers and no excavation or filling of any marsh, wetland or bog shall be done without proper authorization by a special permit issued by the Board of Appeals." 1970 Mass. Adv. Sh. 81, 82, 255 N.E.2d 347, 349.

is not required to grant special permits, which are, in any case, discretionary. This argument was supported by the decision in *Gulf Oil Corp. v. Board of Appeals of Framingham*,[5] wherein the Supreme Judicial Court reversed a Superior Court decree that had been based upon the finding that the granting of a permit would "'confer a substantial benefit to the public.' "[6] The Court thus restored the holding of the board denying the permit. In its opinion, the Court stressed that the board is not compelled to grant a permit because of its discretionary power.[7] This argument is further supported by Section 4 of the Zoning Enabling Act,[8] and by the Duxbury zoning by-laws, as was noted by the Court in the instant case.[9]

The plaintiff in *MacGibbon* argued that the zoning by-law was invalid because the amendment was overly vague in that it did not state sufficient standards to govern the decisions of the board. More crucial to his contention was his argument that the board did not comply with the Supreme Judicial Court's directive in the original appeal, wherein the Court stated that "the facts relevant to the denial of the plaintiffs' petition *to excavate and fill* must be stated."[10] Lastly, it was argued that the denial of the permit constituted a taking of the land without just compensation.

In its opinion, the Court found first that the amendment in question was not overly vague, stating: "We do not think that greater particularity is required. The standards for the guidance of the board are adequate."[11] As to the town's argument that the granting of this special permit was discretionary and therefore not mandatory, however, the Court disagreed and reversed, giving four reasons for its decision. First, and apparently most decisive, the board had not found any "additional or different findings relevant to the proposed excavating and filling . . . ." The Court flatly stated: "The purpose for which we recommitted the case to the board has not been accomplished. The case must go back to the board again for compliance with our directive."[12]

Second, the board had ruled that the escape clause[13] of the by-law

5 355 Mass. 275, 244 N.E.2d 311 (1969), noted in 1969 Ann. Surv. Mass. Law §14.5.

6 Id. at 276, 244 N.E.2d at 312.

7 Id. at 277, 244 N.E.2d at 313.

8 G.L., c. 40A, §4, provides in relevant part: "The board of appeals . . . *may*, in appropriate cases and subject to appropriate conditions and safeguards, grant to an applicant a special permit to make use of his land or to erect and maintain buildings or other structures thereon in accordance with such an exception." (Emphasis added.)

9 1970 Mass. Adv. Sh. 81, 84, 255 N.E.2d 347, 350.

10 347 Mass. 690, 692, 200 N.E.2d 254, 256 (1964).

11 1970 Mass. Adv. Sh. 81, 84, 255 N.E.2d 347, 350.

12 Id. at 85, 255 N.E.2d at 351. This decision might have been prompted by the fact that there was testimony to the effect that the board had made up its mind and prepared a written statement prior to a supposedly public hearing. Record at 25-26.

13 "No obstruction of streams or tidal rivers and no excavation or filling of any

was intended to apply only to inland areas and that there was no permissible exception for a coastal marsh. The court disagreed with this interpretation and held that the board had sufficient authority to grant a special permit for any marshland, be it large or small, inland or coastal.

Third, according to the Court's interpretation of the Duxbury by-law, it is the town's policy to allow special permits for excavating or filling inland and coastal wetlands, and the board, by its interpretation, was trying to circumvent the town's own policy "at least as to coastal wetlands."[14] It was noted that the zoning by-law was an attempt to preserve the coastal wetlands in their natural state, which is beyond the scope of the authority delegated to the municipalities under the Zoning Enabling Act,[15] at least if it is the sole purpose of the board's decision.

Fourth, in response to the contention that since the zoning by-law deprived the plaintiff's land of all practical value, it therefore amounted to a taking without compensation, the Court made no decision since the case was being remanded to the board on other grounds. There was a broad suggestion, however, that such an argument might find considerable support if the case reached the Court at another time, depending "in part on the board's further action on the plaintiffs' application for the special permit."[16]

§17.3. Special permits: Separate licenses required. The special permit for an exception, as a zoning device, does not carry with it any commitment that other licenses and permits required for the permitted use will be forthcoming. This rule was applied during the 1970 SURVEY year in *Davidson v. Board of Selectmen of Duxbury*.[1] The petitioner had obtained a special permit from the town's board of appeals to construct a gasoline service station at a particular location, but the selectmen denied him a license for the storage and sale of gasoline at the situs. The selectmen denied the application due to the existence of such factors as a very congested street, the hazards created by a large nearby parking lot, the probable building of a central post office in the area, and the objections of nearby residents. Upon petition for certiorari, the Superior Court ordered the issuance of the license. The Supreme Judicial Court reversed this decision and dismissed the petition.

The majority of the Court first determined that the denial of the license was proper under standards set out under G.L., c. 148, §13, and

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marsh, wetland or bog shall be done without proper authorization by a special permit issued by the Board of Appeals." 1970 Mass. Adv. Sh. 81, 85, 255 N.E.2d 347, 351.

14 Id. at 86, 255 N.E.2d at 351.

15 G.L., c. 40A.

16 1970 Mass. Adv. Sh. 81, 87, 255 N.E.2d 347, 352.

§17.3. 1 1970 Mass. Adv. Sh. 1173, 260 N.E.2d 695.

the local by-law. Precedent indicates that the licensing authority can consider factors other than fire and explosion danger, including heavy traffic conditions.[2] The majority thus found that the decision of the selectmen in this case cannot be considered arbitrary and capricious, as held by the Superior Court, at least as divorced from the zoning decision granting the special permit.

The Court, in its analysis of the licensing statute[3] and the Zoning Enabling Act,[4] found that they were not so intertwined as to make a decision of the board of appeals on the zoning matter binding upon the selectmen in considering the licensing request. Independent decisions were to be reached on the evidence before each board, and the evidence itself, even if it concerned the same matters, might not be the same at both of the public hearings held before the respective decisions were reached. Thus the majority concluded that principles of res judicata, collateral estoppel, and "law of the case" would not apply to bar the licensing denial. It should be noted that Chief Justice Wilkins and Justice Reardon dissented without opinion.

In a literal sense, the majority of the Court read the statutes correctly. The troublesome fact remains, however, that the result is that one arm of the local government has successfully prevented action permitted by another, and on grounds that were directly relevant and necessarily considered in the granting of the original special permit. The solution may have to be legislative rather than judicial, but a solution is clearly required. The so-called Anti-Snob Zoning Act of 1969 provides for a single hearing and a comprehensive permit to cover all licenses and permits required for the construction of low and moderate income housing.[5] All arms of the local government whose functions are thus being taken over by the board of appeals, however, have the right to appear and present their arguments and expertise to help guide the decision-making agency. This type of model may be one that the General Court might wish to use in all cases in which both zoning and other permits are required. One cannot discount the value of the doctrine of separation of powers and the desirability of some governmental conflicts as a device to prevent any one unit of government from dominating the others. But, in turn, this problem seems minor at the local level in a context such as that of the present case. No one, except perhaps some oil companies, will be disturbed that another filling station cannot be built in Duxbury. The fact remains, however, that the selectmen have, by use of their licensing power, successfully overruled the board of appeals after hearing basically the same evidence. Such a power will tend to undermine the use of special permits, which, according to most planners

2 Sherman v. Board of Selectmen of Orleans, 355 Mass. 786, 243 N.E.2d 816.
3 G.L., c. 148, §13.
4 G.L., c. 40A.
5 G.L., c. 40B, §21.

today, offer the best means of maintaining the necessary flexibility in zoning practice.

§17.4. Special permits: Variation of dimensional requirements. *Adams v. Board of Appeals of Concord*[1] involved a rather typical use of the special permit to authorize multi-family housing in single-family districts. The town enacted legislation requiring a lot of at least 10,000 square feet and 80-foot frontage for each dwelling. The by-law also authorized, upon various requirements and permission by the board of appeals, the erection of garden apartments in certain districts, limiting the minimum lot size to 3500 square feet and leaving the frontage requirement to the discretion of the board. In the instant case, the board approved the development of five garden apartment buildings. The Superior Court's decision dismissing an appeal by an adjacent landowner was affirmed by the Supreme Judicial Court.

The Court noted that the proposed garden apartment buildings would not conform to the regulations of the district in which they were to be located, if that section of the by-law were the only one controlling. It found, however, that the special permit section fully empowered the board to authorize the apartment buildings. The reduced frontage, although substantially less than what would otherwise be required, was permitted by the by-law provision itself. The Court also found that the Subdivision Control Law[2] did not apply under the zoning by-law provision.[3]

This case is most notable for its total acceptance of a zoning regulation that permits, under certain circumstances, mixed housing in a zoning district. At a time when only about 30 percent of the population can afford newly constructed single-family homes, the spread of various types of multi-family housing into many single-family zoned communities will prove impossible to resist. Fine and flexible tools are needed to assure the successful integration of this type of housing into these communities. The special permit is one excellent method by which effective and intelligent planning of this change can be accomplished.

§17.5. Special permits: Discretion to grant. The award of a special permit is discretionary with the granting authority, under the holding of *Gulf Oil Corp. v. Board of Appeals of Framingham.*[1] In the 1970 SURVEY year, this rule was decisive in *Zaltman v. Board of Appeals of Stoneham.*[2] The petitioner sought a permit to build a

§17.4. [1] 1970 Mass. Adv. Sh. 167, 255 N.E.2d 372.
[2] G.L., c. 41, §§81K-81GG.
[3] The Court noted that the definition of *lot* in G.L., c.41, §81L, exempted the locus from the Subdivision Control Law on the basis that it complied with the statutory definition of a single lot not subject to this law.

§17.5. [1] 355 Mass. 275, 244 N.E.2d 311 (1969), noted in 1969 Ann. Surv. Mass. Law §14.5.
[2] 1970 Mass. Adv. Sh. 755, 258 N.E.2d 565.

convalescent home on certain land, part of which was zoned so that it could not be used for this purpose. However, a section of the town by-law authorized the board to grant permission to extend a use from a district in which it was permitted up to 50 feet into a district in which it would be otherwise prohibited. Standards for the board required that, in exercising its judgment, it find that such permission would substantially serve the public welfare or that it would not substantially injure neighboring property.

The board denied the petitioner's request on the ground that a grant would not substantially serve the public interest and that the proposed use was not the most appropriate for this area. Upon appeal, the Superior Court upheld this decision as an exercise of the discretionary power given the board. This discretionary power was deemed dispositive even though the judge found (1) that a similar permit was awarded several weeks later to a landowner on the opposite side of the street and (2) that, because of underlying rock conditions, the proposed convalescent home could be built much less expensively on the proposed site than if it were built fully within that section of the lot where it was permitted as of right.

The petitioner's appeal to the Supreme Judicial Court was also rejected. The discretionary nature of the grant was controlling. Under the by-law, the failure to prove by evidence or by reasons in the board's opinion that the permit was not in the public interest was in no way determinative. The board's decision was specifically stated as being subject to "its judgment." There was no evidence that the board exercised its judgment capriciously or upon a legally untenable ground.

The present case is not unique in its holding, at least after the decision in *Gulf Oil Corp.* It does, however, point out one disadvantage that exists with much special permit legislation, namely that the discretion given is not carefully limited. Totally prescinding from arguments about the necessity of fairly precise standards,[3] the use of valid but indefinite standards does create situations in which litigation can readily arise. The decision in *Zaltman* points up the clear duty of attempting, insofar as language and concepts permit, to avoid the appearance of action taken for other than proper planning grounds. Subsequent to the board's action on the instant plaintiff's application, a similar application was granted for a site near the one proposed by Zaltman. The present standards are perhaps expressed as precisely as they can be, but there may remain some doubt whether the basis of the *Zaltman* disposition was political rather than the standards stated in the by-law.

§17.6. Special permits: Municipal exemptions. The case of *Sinn v. Board of Selectmen of Acton*[1] again raised the question of whether

[3] Clearly the present standards are not objectionable on this ground.

§17.6. [1] 1970 Mass. Adv. Sh. 917, 259 N.E.2d 557.

a municipality may exempt itself from the provisions of its own zoning ordinances. Under Acton's zoning by-law, all municipal uses are exempted from the use restrictions of the by-law, and Acton sought to enlarge its dumping area under this provision. The existing dumping area was created prior to the adoption of the zoning by-laws and so was not subject to its provisions as a pre-existing nonconforming use. In 1969, however, Acton acquired some abutting land and proposed to use it to expand the dump and to construct public works buildings, offices, and a parking lot in the area otherwize zoned for residential and agricultural use. The abutters objected to this proposal and sought to compel the selectmen to expunge the municipal exemption from the zoning by-laws, thereby rendering them able to achieve their purpose only by means of rezoning.

The Supreme Judicial Court has held that a zoning by-law is valid if there is a substantial relationship between it and the general objectives of the Zoning Enabling Act, Chapter 40A of the General Laws.[2] In the instant case, the Court indicated that it could not find that relationship to be lacking: "we cannot say that a broad exemption from use requirements for all municipal uses bears no substantial relation to [those] purposes."[3] The petitioners, on the other hand, argued that municipal exemptions are permissible only if they are specific exceptions, citing *Sellors v. Town of Concord*[4] and *Pierce v. Town of Wellesley*.[5] The Court disagreed, holding that a broad use exception rather than a specific one is permissible, given a rational relationship between the actual proposed use and the purposes of Chapter 40A. Here, the proposed use was clearly related to the town's health and welfare, especially since this was an expansion of the existing dump and not a new location for one.

Petitioners' further argument that the exemption denied them equal protection was dismissed, since the exemption applies uniformly to all districts of a certain class.[6] All residential districts are subject to the presence of municipal uses—even though this particular use is located solely in the petitioners' district.

In brief, the Court upheld "the exemption for all municipal uses for the *particular use* to which it is here applied."[7] (Emphasis added.) It thereby affirmed the validity of a broad municipal exemp-

2 Lanner v. Board of Appeals of Tewksbury, 348 Mass. 220, 202 N.E.2d 777 (1964), noted in 1965 Ann. Surv. Mass. Law §14.1; Cohen v. City of Lynn, 333 Mass. 699, 132 N.E.2d 664 (1956), noted in 1956 Ann. Surv. Mass. Law §1.2; Lundy v. Town of Wayland, 328 Mass. 581, 105 N.E.2d 378 (1952).

3 1970 Mass. Adv. Sh. 917, 919 259 N.E.2d 557, 559-560.

4 329 Mass. 259, 107 N.E.2d 784 (1952).

5 336 Mass. 517, 146 N.E.2d 666 (1957), noted in 1958 Ann. Surv. Mass. Law §§11.1, 14.2, 19.1.

6 Sisters of the Holy Cross of Mass. v. Brookline, 347 Mass. 486, 198 N.E.2d 624 (1964), noted in 1964 Ann. Surv. Mass. Law §§11.6, 14.5. See also Pierce v. Wellesley, 336 Mass. 517, 146 N.E.2d 666 (1957).

7 1970 Mass. Adv. Sh. 917, 921, 259 N.E.2d 557, 561.

tion for unspecified uses, but left determination in a particular case to the relationship between the exemption and a permitted purpose under Chapter 40A.

§17.7. Special permits: Nonconforming signs. *Strazzulla v. Building Inspector of Wellesley*[1] raised the common, but nonetheless vexing, question of the termination of nonconforming structures. In 1963, Wellesley had amended its by-laws to regulate "accessory signs," defined as signs which indicate "the business transacted on the premises . . . and which [contain] no other advertising matter."[2] Before the adoption of this by-law, the plaintiff sold his business to Wright, who relettered the sign to read "Wright's Laundry & Dry Cleaners." Subsequent to the adoption of the by-law, the plaintiff repossessed the business and sought a permit to reletter the sign to read "Linden Cleaners — Shirts – Laundry – Storage." The building inspector refused the permit since the by-law prohibited any alteration of a nonconforming sign, which the sign in question now was. A special permit was also denied by the board of appeals, and the plaintiff sought relief in equity. Meanwhile, the plastic face of the sign was blown away, leaving the frame and wiring exposed, and plaintiff replaced it with the new lettering previously requested and refused. The Superior Court annulled decision of the board and held that the plaintiff was not in violation of the zoning by-law for having proceeded with his relettering.

The by-law in question[3] provided that nonconforming signs could be maintained, but could not be reworded or redesigned, and further provided that the exemption from the by-laws should terminate for any sign which had been abandoned. The intent of this by-law — to ultimately eliminate nonconforming signs — is obvious. The question was whether advertising on private property could be so severely restricted. Quite clearly such advertising can be regulated,[4] and the General Court can delegate this authority to a municipality.[5]

Furthermore, the Zoning Enabling Act[6] specifically authorizes a municipality to "regulate non-use of non-conforming buildings *and structures* so as not to unduly prolong the life of non-conforming uses."[7] (Emphasis added.) Accordingly, the Supreme Judicial Court reversed the opinion of the Superior Court and reinstated the decision of the board.

Concerning the contention that the board acted arbitrarily in denying the permit, the Supreme Judicial Court held that, since the

§17.7. 1 1970 Mass. Adv. Sh. 1013, 260 N.E.2d 163.
2 Id. at 1014 n.2, 260 N.E.2d at 165 n.2.
3 §XXIIA of the zoning by-laws of Wellesley.
4 Mass. Const. amend. 50; General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935).
5 Town of Milton v. Donnelly, 306 Mass. 451, 28 N.E.2d 438 (1940).
6 G.L., c. 40A.
7 Id. §5.

board's power to grant a special permit is discretionary and not compelled, and since the refusal was based on the belief that the granting of the permit "would derogate from the general purpose and intent of . . . the Zoning By-law,"[8] the board's decision was not arbitrary nor capricious and was thus valid.[9]

Outdoor signs have always tended to raise serious aesthetic questions among many people. The history of the validation of restrictions and bans of such signs is long and arduous. The courts have gone far beyond the question of whether regulation of signs is constitutionally permissible, and it is instructive to note that this issue was no more than summarily considered by the Court in the present case. Once regulation of signs is recognized as valid, the usual balancing test of private loss against public gain is applied — and there is little private loss in the denial of a permit for a roof sign, particularly when other signs advertising the business are permissible on the site.

§17.8. Floating use: Discretionary permit. In *Senkarik v. Attorney General,*[1] the town of Uxbridge had adopted an amendment to its zoning by-law that would grant to the board of appeals authority to permit the construction of apartment buildings anywhere in the community. The only guide for the board's action was that consideration must be given to the effects of the permit of the neighborhood and the town at large. The attorney general disapproved of the amendment on the ground that it authorized spot zoning.[2] The petitioner sought mandamus against the attorney general but was denied relief by the Superior Court. The Supreme Judicial Court found no error in the decision below.

In the 1946 decision of *Smith v. Board of Appeals of Fall River,*[3] the Supreme Judicial Court invalidated discretionary power to indulge in spot zoning granted to a board by a zoning ordinance. The Court in the instant case cited *Smith,* noting that it was the basis for the attorney general's disapproval of the amendment. An argument could be made that the present by-law did not, however, authorize "spot zoning" in the classic "amendment to zoning regulation" sense. The present procedure was a variation of the special permit device and, had it been more rationally applied and regulated by more effective standards, would have been valid. But the evil of the present by-law is that it would permit what is in effect an amendment to the zoning by-law without following the required procedures for adoption of amendments.[4] Since the board of appeals is not a legislative body,

8 1970 Mass. Adv. Sh. 1013, 1016-1017, 260 N.E.2d 163, 166.

9 See Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 244 N.E.2d 311 (1969), noted in 1969 Ann. Surv. Mass. Law §14.5.

§17.8. 1 1970 Mass. Adv. Sh. 457, 257 N.E.2d 470.

2 The attorney general acted under his authority in accordance with G.L., c.40, §32.

3 319 Mass. 341, 65 N.E.2d 547 (1946).

4 G.L., c. 40A, §7.

its attempts to change the statute would necessarily result in a finding of improper delegation of legislative powers. It is thus not difficult to find several reasons, beyond the "spot zoning" objection, for declaring the present amendment invalid. But it is worthy of note that the town was at least recognizing the need for multi-family housing, a need many communities have failed to understand. It is to be hoped that the next attempt by Uxbridge will reach the desired objective by valid means.

§17.9. Violation of zoning by-law: Removal of part of building. *Town of Marblehead v. Deery*[1] grew out of a petition by the eventual defendant (Deery) to the selectmen as the town board of survey, seeking approval of a private way (Sean's Way) in connection with a subdivision plan. The plan was approved after appropriate notice and hearing; separate certificates of title were issued to the owners of the new lots; and sewer and other services were supplied for the new way. Deery's home, already on the land, was placed in the approved plan on a lot abutting on Sean's Way. Nearly five years later, and after Deery had done considerable renovation to that part of his home standing closest to the new way, the town building inspector, at the behest of the board of selectmen, gave him notice that since the house was only 8.55 feet from Sean's Way, it did not comply with the front yard requirements of the town's by-laws,[2] which require 20 feet. The building inspector sought to have the offending part of the house removed.

The trial court found that the east side of the house was not the front entrance merely because it was the closest to a road or way. On the contrary, the judge found that both aesthetically and otherwise — the east door is below ground level and opens on a laundry room — the main entrance had shifted from the north side to the south side of the house. Consequently, the front yard would be to the south facing also onto Sean's Way, and there would be no violation of the front yard requirement.[3]

The trial court found further that the location of the house was the same as it had been under the former owners, and that the establishment of a private way "did not alter, reconstruct, or extend the dwelling structure."[4] Since the zoning by-laws are not applicable to a pre-existing use,[5] the court found that they were not applicable in this case.

§17.9. [1] 1969 Mass. Adv. Sh. 1443, 254 N.E.2d 234.
[2] Marblehead Zoning By-Laws §8 (1966).
[3] Report of material facts, rulings and order for decree. Record at 9.
[4] Record at 10.
[5] "[A] zoning ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of adoption of the ordinance or by-law, but it shall apply to any change of use thereof . . . ." G.L., c. 40A, §5.

As to the trial judge's finding that the front yard had moved to the south of the house, the Supreme Judicial Court stated: "We interpret the by-law as intended to treat the front yard of a house as lying in the direction of the closest point of the way on which the owner's land abuts . . . ."[6] This statement has support in the "Front Yards" statute: "In all residence districts no building shall be constructed or maintained within 20 feet of any street line . . . ."[7] But there may be a showing of a different legislative intent since the title of the section, Front Yards, becomes meaningless if the only definition of a front yard is that yard which lies closest to a street. The two cases cited in favor of the Court's position give definitions of other front yard or setback provisions, but do not lend strong support to its position on the intent of the provisions of the Marblehead by-law.[8]

As to the trial judge's second finding — that the house was exempt from the by-law as a pre-existing use — the Supreme Judicial Court found that the creation of the subdivision "materially changed the use of the premises to one now not in conformity with the by-law. In 1960 the use of the house was, and for some time had been, in conformity with the by-law. It was not a nonconforming use."[9] On this point the Court clearly reached the correct decision, following its own relevant precedents in citing *Howland v. Acting Superintendent of Bldgs. and Inspector of Bldgs. of Cambridge*[10] and *Alley v. Building Inspector of Danvers.*[11] Each of these cases holds that subdivision changes the use of land and so removes it from the protection of the pre-existing use exemption.

Despite its rejection of the findings of the trial court, the Supreme Judicial Court denied the injunctive relief sought by the town "on recognized equitable principles."[12] Although these principles cannot include estoppel since a town cannot be estopped by the actions of its officers,[13] elements of the estoppel doctrine were present. The Court noted that Deery made "substantial expenditures on his house, and presumably on Sean's Way, in reliance on the 1960 decision of the selectmen acting as a board of survey."[14] Because of construction and conveyances, he could no longer change the location of Sean's Way to conform to the by-law. In addition to these factors, the Court also noted that all parties had acted in good faith, and that Deery had

6 1969 Mass. Adv. Sh. 1443, 1447, 254 N.E.2d 234, 237.

7 Marblehead Zoning By-Laws §8 (1966).

8 Selectmen of Lancaster v. DeFelice, 352 Mass. 205, 224 N.E.2d 219 (1967); Scott v. Board of Appeal of Wellesley, 356 Mass. 159, 248 N.E.2d 281 (1969).

9 1969 Mass. Adv. Sh. 1443, 1447, 254 N.E.2d 234, 237.

10 328 Mass. 155, 102 N.E.2d 423 (1951).

11 354 Mass. 6, 234 N.E.2d 879 (1968).

12 1969 Mass. Adv. Sh. 1443, 1448, 254 N.E.2d 234, 238.

13 Ferrante v. Board of Appeals of Northampton, 345 Mass. 158, 186 N.E.2d 471 (1962); Cullen v. Building Inspector of North Attleborough, 353 Mass. 671, 234 N.E.2d 727 (1968).

14 1969 Mass. Adv. Sh. 1443, 1447, 254 N.E.2d 234, 237.

been without counsel and did not have the benefit of proceedings under the Subdivision Control Law (despite the fact that Marblehead has a population of greater than 10,000 and is required to create a planning board under that statute).[15] Since the members of the board of survey were the selectmen who would have constituted the appeals board able to grant a variance, and since there was no showing of public advantage to be gained by a rigid enforcement of the by-law, the Court allowed the house to remain intact.

One may wonder whether this case does not represent a rather deserved reaction to Marblehead's refusal to adopt the more sophisticated type of subdivision control possible under G.L., c. 41, §§81K-81GG. A more controlled procedure would have alerted the town as well as Deery to the failure of the lot to comply with the zoning by-law, assuming that the front yard requirement is as interpreted by the Court. Despite the Court's assurances, this case comes very close to applying estoppel to a municipality, and this seems likely to have occurred because the town procedures were inadequate rather than because town officials acted improperly under adequate procedures.

§17.10. Aesthetic restrictions: Reasonable standards of enforcement. *Donoghue v. Prynnwood Corp.*[1] deals with questions raised and left unanswered by *Snow v. Van Dam*[2] and *Patrone v. Falcone.*[3] In the present case, Prynnwood owned land near a country club which it divided into 45 lots, all of which had been sold when this suit was brought. Prynnwood retained some adjacent vacant land. Each lot sold contained varying restrictions. All contained the common restriction that "[Prynnwood] must approve all finished plans of [the] buyer's proposed home . . . ."[4] Most of the other deeds, but not Donoghue's, also contained the provision that Prynnwood " 'reserves the right to amend these restrictions from time to time and . . . the right to waive compliance with these restrictions in any instance.' "[5]

At the time of the sale, May 2, 1965, Donoghue was informed by one McCullough, an agent for the corporation, that Prynnwood would prefer a one-story house so that other homes would have an unimpaired view of the country club. Donoghue presented McCullough with a rough penciled sketch of his proposed house. No objection was made by McCullough nor by Munson, Prynnwood's sole stockholder, when the plan was given to him with Donoghue's deposit.[6]

15 G.L., c. 41, §81A. In 1926 the town created a planning board, but there is no indication that it ever performed any functions which would affect this case. Furthermore, various exhibits indicate that Marblehead has not yet accepted the provisions of the Subdivision Control Law, despite the fact that its population exceeded 10,000 in 1953.

§17.10. 1 1970 Mass. Adv. Sh. 161, 255 N.E.2d 326.
2 291 Mass. 477, 197 N.E. 224 (1935).
3 345 Mass. 659, 189 N.E.2d 228 (1963), noted in 1963 Ann. Surv. Mass. Law §1.8.
4 1970 Mass. Adv. Sh. 161, 162 n.2., 255 N.E.2d 326, 328 n.2.
5 Id. at 162, 255 N.E.2d at 328.
6 The evidence is conflicting here, with Donoghue and McCullough testifying as

Donoghue then employed a prominent architect who designed a modern, one-story, flat-roofed house costing in the vicinity of $130,000. Munson refused to approve these plans, primarily because of his objections to a flat roof. Donoghue and Munson had several meetings in an attempt to resolve the impasse, but Munson persisted in his refusal to approve the plans. On December 30, 1965, Donoghue sought declaratory relief in probate court, asking that Munson be ordered to approve the plans as submitted, claiming his refusal to do so was arbitrary, capricious, and in bad faith. Munson filed a general denial to the allegations and further stated that Donoghue bought with knowledge of the restriction and should be estopped to deny its validity. Munson also demurred on the ground that there had not been a joinder of the other lot owners as necessary parties. The probate judge made findings of fact and reserved and reported the case to the Supreme Judicial Court without decision.[7]

In considering the case, the Supreme Judicial Court first considered the nonjoinder issue and focused on the fact that Munson had testified that he would have approved Donoghue's plans had it not been for the objections of neighbors.[8] Consequently, the question was whether the neighbors had standing to enforce the restrictive covenant. According to *Snow v. Van Dam* — the leading case in this area — they would have standing if there was evidence of a common building scheme established before the lots were sold.[9] Since there was no evidence showing the existence of a common building scheme,[10] the Supreme Judicial Court found that a restrictive covenant, absent a common building scheme, is enforceable only by the grantor. This finding is supported by *Patrone v. Falcone,* a similar case in which neighboring lot owners were held to have no standing to sue despite a provision in the deed stating that the restriction was for the benefit of the other lot owners. A partial basis for this decision was the fact that "[e]lsewhere it has been held that a reservation by a common grantor of general power to release the restrictions on a particular lot negatives the intention to establish a common scheme."[11] This reservation was present in *Donoghue* since there were several visible exceptions to a common building scheme, such as two houses "which might be classified as modern." Consequently, the finding of no common building scheme seems fully justifiable.

The Supreme Judicial Court next considered the question of

to the existence of the sketch (Record at 31) and Munson denying that he had ever seen it (Record at 3, 26). Nonetheless, the Supreme Judicial Court found that: "From the reported evidence, however, we ourselves could draw the inference that McCullough did in fact show the sketch to Munson." 1970 Mass. Adv. Sh. 161, 162 n.3, 255 N.E.2d 326, 328 n.3.

7 G.L., c. 215, §13.

8 Record at 26, 29.

9 291 Mass. 477, 483, 197 N.E.2d 224, 227 (1935).

10 1970 Mass. Adv. Sh. 161, 163, 255 N.E.2d 326, 329.

11 345 Mass. 659, 662, 189 N.E.2d 228, 230, (1963).

whether Prynnwood could enforce the restriction using no particular objective standard other than whim and aesthetic taste. In general, an equitable provision containing a restrictive element is strictly interpreted in favor of limiting the restriction. For example, in *Hemenway v. Bartevian*[12] a restriction was not enforced when there was some doubt about its application to the situation. "If the question can be said to be doubtful, then it is a doubt which should be 'resolved in favor of the freedom of land from servitude.' "[13] If a restriction is exercised reasonably, it will be enforced. In *Parsons v. Duryea,*[14] the conveyor refused to authorize a building plan, which refusal the buyer disregarded. A temporary restraining order was issued after the defendant had spent $200. The Supreme Judicial Court affirmed, stating: "The restrictions in question do not prevent the owner from conveying the property or impose any unlawful restraint of trade. They affect only its mode of use and must be held to be valid."[15] If, on the other hand, a restriction is sought to be enforced unreasonably and arbitrarily, quite possibly enforcement will be denied.[16]

All of these decisions are basically consistent; the ultimate decision rests upon whether there is any real basis for withholding approval. In *Donoghue,* "[t]he trial judge's findings go far to show Munson's conduct to have been arbitrary."[17] There were two other "modern" houses in the development; the proposed house would not be economically detrimental to the neighborhood; and Munson would actually have approved but for the objections of the neighbors.[18] The Supreme Judicial Court also noted that similar covenants had not been enforced against others.

Consequently, a final decree was ordered, declaring that: (1) Prynnwood had refused approval of Donoghue's plans unreasonably; (2) such approval was no longer required; and (3) Prynnwood was not entitled to either injunctive relief or damages.

This decision was reached despite Donoghue's having proceeded with his building plan before he had received approval. This action may have been justified, according to the Court, because of Prynnwood's unreasonable refusal and because of the denial of a preliminary injunction against further construction by Donoghue.[19] Although, as noted above, the Supreme Judicial Court has respected the use

12 321 Mass. 226, 72 N.E.2d 536 (1947).

13 Id. at 229, 72 N.E.2d at 538.

14 261 Mass. 314, 158 N.E. 761 (1927).

15 Id. at 316, 158 N.E. at 762.

16 See Nassif v. Boston & Maine R.R., 340 Mass. 557, 566, 165 N.E.2d 397, 402 (1960).

17 1970 Mass. Adv. Sh. 161, 164, 255 N.E.2d 326, 329.

18 Record at 4.

19 1970 Mass. Adv. Sh. at 163 n.41, 255 N.E.2d at 328 n.4.

of covenants appurtenant to land,[20] basic equity principles must be observed:

> But it is very clear that a suit in equity to compel a compliance with such . . . [restrictions] concerning the use of property must be reasonably commenced, before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damages on parties acting in good faith. In such cases, a prompt assertion of right is essential to a just claim for relief in equity.[21]

Aesthetics and beauty, imposed as in the present case by covenant or in some other situations by statute, create difficult interpretive problems. The questions presented by the instant case could have been solved by a doctrine that avoided the justification or rejection of an aesthetic judgment solely on aesthetic grounds. It is interesting to speculate whether Munson's decision could have been supported upon somewhat different and purely beauty-oriented grounds — or if it should have been. In effect, aesthetic judgments are personal, and Donoghue's use of a noted architect may not necessarily have prevented the aesthetic judgment from going against him.

§17.11. Variances: Standards and constitutional issues. By this time in the history of the Commonwealth, it is quite obvious that the Supreme Judicial Court demands full compliance with the Zoning Enabling Act provisions governing the grant of a variance.[1] The Court, during the 1970 SURVEY year, construed the Boston Zoning Code to the same effect in *McNeely v. Board of Appeal of Boston*.[2] Suffolk University was granted a variance to build a five-story classroom building on a lot in a zone with a permitted floor space to lot area ratio of 2 to 1, and certain parking, loading and front yard requirements. The floor to lot ratio of the proposed building was less than 6.3 to 1. Other requirements had also not been met. The board gave no reasons for its approval except to state that relief from the loading bay requirement was appropriate because the building would require only light deliveries. The variance was upheld by the Superior Court.

The Supreme Judicial Court reversed. It first stated the requirements for the grant of a variance and then held that compliance was lacking as to each one. The conditions affecting this land were not

20 See generally Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1935).
21 Whitney v. Union Ry., 77 Mass. (11 Gray) 359, 367 (1858).

§17.11. 1 G.L., c. 40A, §15. See discussion in 1969 Ann. Surv. Mass. Law §14.7; 1968 id. §12.5; 1967 id. §11.1; 1964 id §14.3; 1962 id. §13.2; 1959 id. §12.1; 1958 id. §14.9.
2 970 Mass. Adv. Sh. 1201, 261 N.E.2d 336.

different from those affecting other land in the vicinity, and the "impelling need" of Suffolk had nothing to do with the locus but with the overcrowded conditions of its other facilities. Hardship was solely financial, and that had been created by the cost per student of building a conforming building in place of the proposed nonconforming one. The finding that the variance would not derogate from the interest and purpose of the zoning code was overturned upon unrefuted evidence that the purpose of the zone regulations was to help preserve the historic Beacon Hill district, upon which the lot in question bordered.

The Court found that the decision of the board was invalid for other reasons as well. The board did not make the explicit findings required for the granting of a variance, and the mere restatement of the statutory conditions was insufficient.[3] On both this issue and the issue of the grounds for granting a variance, no new law was considered; the Court merely made it clear that a decision under the Boston Zoning Code must comply with the same standards as imposed by the Zoning Enabling Act.

The difficult and unique issues of this case relate to the constitutional arguments maintained by Suffolk. The arguments are interesting and complex. Suffolk first argued that Mass. Const. pt. II, c. 5, §2,[4] which imposes upon the General Court the duty of supporting schools and educational institutions, rendered unconstitutional any application of zoning regulations to the university. The Supreme Judicial Court rejected the argument, fiinding the constitutional language hortatory and hence not directive upon the legislature. It also noted that Article 60 of the Amendments to the Constitution authorized zoning without any indication that protection was to be given educational institutions.

Suffolk also claimed that it had been denied equal protection of the law because the provision in the general Zoning Enabling Act that forbids the adoption of zoning regulations prohibiting or interfering

3 Cases in this area are legion. See Barnhart v. Board of Appeals of Scituate, 343 Mass. 455, 179 N.E.2d 251 (1962), and the numerous cases cited therein. See also 1962 Ann. Surv. Mass. Law 13.2.

4 This section reads as follows: "Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the town; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufacturers, and a national history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humour, and all social affections, and generous sentiments among the people."

with the use of land for educational purposes[5] was not included in the Boston Zoning Code. The Court rejected this argument, noting that Boston is often treated specially by the legislature.[6] The Court found that the omission of this exception from the Boston regulations represented a delegation of reasonable contract in the city where land use is most intense, population most dense, and land use by educational, religious, and other institutions most pervasive. The Court also noted that this argument was not apposite, since the Boston zoning regulations for the district involved did not in any way restrict educational use. Unlike those in *Sisters of the Holy Cross v. Town of Brookline,*[7] the normal regulations of this district did not operate in a way that prejudiced reasonable educational use.

During the 1970 SURVEY year the Court decided another Boston Zoning Code variances case, *Wolfson v. Sun Oil Co.*[8] The Boston Board of Appeals granted an extension of a nonconforming use and a variance to a locus purchased some years after the defendant oil company had used the adjoining land for a gasoline station. Again, as in *McNeely,* the board's decision was invalid on its face because of its failure to make findings supporting the grant of the variance and its mere repetition of the statutory language. The Court also found that no hardship in the statutory sense existed, since the burden related not to the locus but to Sun's economic disadvantage in not being able to expand its station.

The two cases noted above illustrate the Court's continuing strict interpretation of the statutory provisions governing the grant of variances. The policy underlying this attitude can be fully rationalized particularly now when the special permit device offers a much more controlled and better-planned way of modifying zoning regulations. In too many jurisdictions the variance has been exercised irresponsibly and without regard for the planning and developmental needs of a community. Since flexibility is now attainable by other methods of varying zoning, the variance must properly be kept to its narrow sphere of operation.

§17.12. Zoning procedure: Defects that are jurisdictional. The Supreme Judicial Court has at various times considered whether or not defects in following the appeal procedures under G.L., c. 40A, §21, are jurisdictional. Thus, in both *Lincoln v. Board of Appeals of Fram-*

5 G.L., c. 40A, §2.

6 The Court discussed Opinion of the Justices, 341 Mass. 760, 168 N.E.2d 858 (1960) (upholding special urban renewal and planning legislation for Boston), noted in 1961 Ann. Surv. Mass. Law §12.5, 1960 id. §§10.2, 13.8; and Begley v. Board of Appeal of Boston, 349 Mass. 458, 208 N.E.2d 799 (1965) (upholding a unique requirement that bond be posted before an appeal be allowed for grant of a variance in Boston), noted in 1965 Ann. Surv. Mass. Law §§11.10, 14.3.

7 347 Mass. 486, 198 N.E.2d 624 (1964), noted in 1965 Ann. Surv. Mass. Law §14.13, 1964 id. §§11.6, 14.5.

8 1970 Mass. Adv. Sh. 315, 256 N.E.2d 308.

ingham[1] and *Maria v. Board of Appeal of Lowell*,[2] failure to give notice to the town or city clerk of the entry of a bill was fatal, and the Superior Court had no jurisdiction of the appeal. But, as the Court noted in *Bearce v. Zoning Board of Appeals of Brockton*,[3] the pleading of the notice was not the critical element; it was the actual giving of the notice that went to the jurisdiction.

The concept of substance over form underlies the opinion in *Shaughnessy v. Board of Appeals of Lexington*,[4] decided during the 1970 SURVEY year. At the trial, the judge elicited the fact that the affidavit which the petitioners were required to file under Section 21 had not been filed within the 21 days prescribed from the date of entry of the bill. The next sentence in the statute reads: "If no such affidavit is filed within such time the bill shall be dismissed." Reading this sentence as imposing a jurisdictional requirement, the trial judge dismissed the bill. The Supreme Judicial Court reversed this decree and ordered trial of the issues on the merits. The Court noted that the giving of the proper notice within the prescribed time to those who are the proper defendants was jurisdictional. The actual notice is jurisdictional, but the filing of the affidavit merely acts as an affirmation that these essential acts were done. The affidavit is thus not jurisdictional in itself. When the essential jurisdictional acts are completed within the prescribed periods, the filing of the affidavit somewhat late should not nullify the effect of the essential acts. The Court did note that the failure to file the affidavit within the prescribed time was the omission of an important act that could be "critical" but not "necessarily fatal." Thus it would be mandatory to show prejudice because of the nontimely filing of the affidavit before the bill would be dismissed on this ground.

As the Court noted in its opinion, the substantial jurisdictional issues cannot be divorced from Section 21, but the section should be carefully construed so that only those failures that relate to essential items should bar the bill. No procedural bars, reminiscent of early pleading cases, should be interposed without a positive showing of legislative intent. The present case, had the affidavit provision been held to be jurisdictional, would have expressed an undesirable dominance of form over function. However, no one should expose himself to the risk that this failure might be, if not "fatal," sufficiently "critical" to bar the substantial relief sought upon the facts of his particular case.

§17.13. Zoning procedure: Notice of proposed hearing and jurisdiction. In *Planning Board of Peabody v. Board of Appeals of Pea-*

§17.12. [1] 346 Mass. 418, 193 N.E.2d 590 (1963), noted in 1964 Ann. Surv. Mass. Law §14.4.

[2] 348 Mass. 798, 206 N.E.2d 94 (1965), noted in 1965 Ann. Surv. Mass. Law §14.16.

[3] 351 Mass. 316, 219 N.E.2d 15 (1966), noted in 1966 Ann. Surv. Mass. Law §§15.12, 15.16.

[4] 1970 Mass. Adv. Sh. 183, 255 N.E.2d 367.

body,[1] one Trager was given a special permit by the board of appeals to remove fill and gravel from a particular piece of property. The planning board's appeal was rejected by the Superior Court but sustained by the Supreme Judicial Court. The question concerned the notice given under Section 17 of the Zoning Enabling Act[2] of the hearing before the board of appeals on the petition for the permit. No question arose concerning the published notice, but Section 17 also requires that the board of appeals "send notice by mail, postage prepaid, to the petitioner and to the owners of all property deemed by the board to be affected thereby . . . and to the planning board . . . ." In this case a member of the board of appeals obtained the names of the abutting property owners and gave the list to the petitioner's attorney, who sent out the notices. The Supreme Judicial Court found the notice was not sufficient to give the board of appeals jurisdiction to hear the petition. The duty of the board itself to mail the notices was nondelegable, and failure to comply made the board's decision invalid.

Notice to those affected is, under the Zoning Enabling Act, essential before rights in land can be affected. The Court has construed this to require precise and exact compliance with the statute in order to assure that no administratively more facile but perhaps less effective procedure be used. Local authorities have often depended upon those seeking to obtain some permit or license to carry the cost and responsibility of sending out necessary notices and taking other action on behalf of the official. The present case is at least a warning to those involved in zoning that the rather informal methods occasionally used in the past will have to cease.

§17.14. **Zoning procedure: Proposed use described in notice.** In *Fish v. Building Inspector of Falmouth*[1] the notice of a hearing described the purpose for which a permit was sought as being for a "mixing, batching, and processing plant." The permit was granted but, after the appeal period had expired, the board of appeals allowed an amendment seeking permission to "construct and install a stone crushing plant." The Supreme Judicial Court, in a rescript opinion, found the original notice not sufficiently broad, specific or informative to permit the additional use sought after the amendment. This aspect of the opinion emphasizes the necessity of an adequate and sufficiently detailed notice to assure that the permission granted will not be later declared invalid.

§17.15. **Zoning procedure: Detailed record of proceedings.** General Laws, c. 40A, §18, requires local boards of appeal to keep a detailed record of their proceedings reflecting their voting record and

§17.13. [1] 1970 Mass. Adv. Sh. 1185, 260 N.E.2d 738.
[2] G.L., c. 40A.

§17.14. [1] 1970 Mass. Adv. Sh. 837, 258 N.E.2d 743.

setting forth reasons for their decisions. The Wellesley zoning by-law relating to special permits prescribes that no permit be granted without a written finding (to be filed with the board's records) that certain conditions will obtain. Under the statute and by-law mandates, the board adopted as a rule the requirements that the clerk take notes on information stated and that at the executive session he record the exact vote of the members and the reasons for granting or refusing a permit. These records are to be incorporated into the board's decisions.

In *Zartarian v. Minkin*[1] the board granted the defendants a permit to build a convalescent and nursing home in a residential district, making the findings required by the Wellesley by-law. Evidence indicated, however, that no executive session was held by the board; and the members, after reserving their decisions at the public hearing, later telephoned the clerk to record their votes in favor of granting the petition. The Supreme Judicial Court affirmed the judgment below, namely, that the defects in the procedure did not invalidate the action of the board. The decision substantially complied with the town by-law, and the disregarded procedure was treated by the Court as internal and "waivable" by the board. The Court did, however, note that the failure to use the formal, prescribed procedure raised uncertainties and invited litigation, implying that a board's compliance with its own rules is to be recommended.

Several other contentions raised by the plaintiffs (nearby property owners) related to the legality of conditions imposed by the board on the defendant's use of the property for the permitted purposes. The Court found that these conditions merely made the permit subject to termination for noncompliance. They were held not to create the type of condition that would cause a purported grant to be merely an advisory opinion. Thus the rule of *Weld v. Board of Appeals of Gloucester*,[2] to the effect that a board cannot grant a permit conditional on a subsequent determination, was not controlling. Despite some criticism, the difference between grants subject to divestment and conditional grants is well established in law. The instant case and the *Weld* decision were differentiated accordingly. Certainly, also, as a matter of the most repeated land use planning doctrine, application of *Weld* should be limited to cases having similarly unusual sets of facts. The need for greater implementation of the special permit device, combined with the need for conditions to be imposed on such grants, strongly suggests that any doctrine limiting the effective application of the device should be applied only in extraordinary situations.

§17.15. [1] 1970 Mass. Adv. Sh. 189, 255 N.E.2d 362.

[2] 345 Mass. 376, 187 N.E.2d 854 (1963), noted in 1963 Ann. Surv. Mass. Law §§12.4, 13.4.

§17.16. Definition of lot. In *Miller v. Board of Appeals of Brookline*[1] a special permit for a nonresident parking area on lots numbered two through four was granted to one Nordbloom and others who were trustees for Pelham Hall, an apartment hotel. The zoning by-law requires that a nonresident parking area must abut or be across the street from a nonresidence district, and the plaintiffs argued that only a small area of the locus so qualified. In support of their argument, the plaintiffs contended that since the locus was divided into three lots before purchase by Nordbloom, the special permit for nonresident parking should be limited to that ten-foot segment of the tract that was directly across the street from the business district. The rest of the property faced a residential area. The trial judge found the entire locus to be across the street from a nonresidence district. This finding was affirmed by the Supreme Judicial Court, which rejected the plaintiffs' argument that the locus should be divided into three original lots. The Court quoted the concluding sentence of §2.17 of the Brookline by-law, which reads: "A lot for the purpose of this [b]y-law may or may not coincide with a lot of record." Consequently the zoning by-law was held not to require that the board treat the one locus as three separate lots. This holding comports with the fairly clear intent of the zoning by-laws, and is consistent with cases holding that lots originally separate but now held under single ownership can be treated as a single lot.[2]

§17.17. Zoning and earth removal: Statutory interpretation. *Goodwin v. Board of Selectmen of Hopkinton*[1] involved a possible conflict between an earth removal by-law authorized under G.L., c. 40, §21(17), and a zoning by-law authorized under G.L., c. 40A. Both by-laws were adopted at the same town meeting by separate votes. The petitioners sought a writ of mandamus ordering the selectmen to revoke the earth removal permit issued to Pyne Sand & Stone Co. They contended that since the zoning by-law does not allow earth removal as a permitted use — either as of right or by special permit — and since the earth removal by-law states that nothing therein "shall be deemed to amend, repeal or supersede the Zoning By-Law,"[2] the permit was invalidly issued by the board of selectmen. The respondents countered that the earth removal operations did not violate the zoning by-law which expressly provides that "[e]arth removal shall be permitted only in accordance with the Earth-Removal By-

§17.16. [1] 1970 Mass. Adv. Sh. 109, 255 N.E.2d 365.
[2] Vassalotti v. Board of Appeals of Sudbury, 348 Mass. 658, 204 N.E.2d 924 (1965), noted in 1965 Ann. Surv. Mass. Law §14.5; Chater v. Board of Appeals of Milton, 348 Mass. 237, 202 N.E.2d 805 (1964), noted in 1965 Ann. Surv. Mass. Law §14.12; Vetter v. Zoning Board of Appeal of Attleboro, 330 Mass. 628, 116 N.E.2d 277 (1953), noted in 1954 Ann. Surv. Mass. Law §1.4.

§17.17. [1] 1970 Mass. Adv. Sh. 1277, 261 N.E.2d 60.
[2] Id. at 1279, 261 N.E.2d at 62.

Law,"[3] and that the earth removal by-laws apply "to all areas regardless of zoning district."[4]

The trial judge and the Supreme Judicial Court agreed with the respondents, primarily on the basis that the petitioners' argument would render the relevant portions of both by-laws nugatory and would forbid earth removal under any circumstances. While the Court felt that "[t]he language of both by-laws could have more precisely defined their intended relationship,"[5] it found that the two were not mutually exclusive:

> . . . A municipality may properly desire to have two separate ordinances or by-laws to avoid the involved and strict procedural requirements for adopting or amending zoning ordinances and by-laws. . . . While G.L. c. 40, §21(17), is available to municipalities which have no zoning ordinances or by-laws, it is equally available to other municipalities.[6]

The result in this case is eminently sensible if it is assumed that one by-law adopted at a town meeting was not meant to amend or repeal another adopted at the same meeting. The problem was one of unartful language in the by-laws, a not uncommon if hardly excusable phenomenon. As the Court noted, the language used to coordinate the two by-laws did raise interpretive problems, but separate by-laws for the two subjects were reasonable.

§17.18. Public housing as permitted use: Unreasonable classification. General Laws, c. 40A, §2, requires, inter alia, that zoning regulations and restrictions be uniform as to types of buildings and kinds of use within each zoning district. A problem of improper classification arose during the 1970 SURVEY year in *Cameron v. Zoning Agent of Bellingham*.[1] Under the zoning by-law as amended in 1968 and 1969, multi-family housing was permitted in the town but only in districts that would be created by amendment to the zoning map by the town meeting. In a rather confused footnote to the by-law, public housing was exempted from the provisions on multi-family housing and was permitted under the by-law in all use districts except industrial.

The defendant zoning agent had granted a permit to build a 64-unit public housing complex for the elderly. The present action was a petition for a writ of mandamus to enforce the zoning by-law and revoke the permit. The petitioner contended that the distinction made between public housing and other multi-family housing was inherently discriminatory in that it based the use of land upon its

[3] Id. at 1278, 261 N.E.2d at 61.
[4] Id. at 1279, 261 N.E.2d at 62.
[5] Id. at 1281, 261 N.E.2d at 63.
[6] Id. at 1282-1283, 261 N.E.2d at 64.

§17.18. [1] 1970 Mass. Adv. Sh. 1081, 260 N.E.2d 143.

ownership and not in accordance with uniform regulations for each type and class of building.

The Supreme Judicial Court noted that legislative bodies "have wide powers of classification based upon reasonable differences in facts underlying the several classifications."[2] It pointed out that public housing authorities are public instrumentalities carrying out public functions, supported in part by public funds and subject to an intensive statutory scheme of regulation, all factors that are not true of multi-family housing of other types. The Court thus found, on the evidence of this record, that separate treatment of public housing and private multi-family housing was appropriate. Hence the classification was not unreasonable.

The care with which the Court noted that the classification was valid on the facts before it certainly suggests that on other facts it might reach a different conclusion. It would not appear likely, however, that such facts would exist where differing classification of these two types of multi-family housing was not possible. The reverse question is also an interesting one — whether public housing can be kept out of a community by the use of zoning regulations restricting all multi-family buildings and uses. Pressures for such housing are indeed great, and it is arguable that such a restriction could be invalid as a denial of equal protection. The new so-called Anti-Snob Zoning Law, discussed in Chapter 18 of this SURVEY, represents a legislative response to the compelling need for low and moderate income housing in some areas of the state. The question exists whether, even absent these conditions, a court might not find that restrictions on multi-family housing, particularly the less expensive type, are unconstitutional.

B. EMINENT DOMAIN

§17.19. Public utilities: Local and state control of routes. *Boston Edison Co. v. Town of Sudbury*[1] is the latest of a long line of cases dealing with the construction of an overhead electrical transmission line. The first *Sudbury* case[2] had held that under G.L., c. 164, §72, a petition for authority to construct a transmission line must be filed with the Department of Public Utilities, which could authorize construction based on public convenience and necessity. The utility must also, under this case, file a subsequent petition for authority to take by eminent domain if necessary. The case also held that each separate determination of the department is a final and appealable

[2] Id. at 1085, 260 N.E.2d at 146.

§17.19. [1] 356 Mass. 406, 253 N.E.2d 850 (1969).
[2] Town of Sudbury v. Department of Public Utils., 343 Mass. 428, 179 N.E.2d 263 (1962), noted in 1962 Ann. Surv. Mass. Law §15.2.

order. The second *Sudbury* case[3] was basically a reaffirmation of the first, granting authority in a subsequent eminent domain proceeding. In *Boston Edison Co. v. Board of Selectmen of Concord*[4] the Court held that it was within the authority of the local board of selectmen to deny Edison's petitions for street crossing locations under G.L., c. 166, §§21, 22 and 28, even if such denial were based solely on aesthetic considerations. In *Town of Framingham v. Department of Public Utilities*,[5] on the other hand, the Court held that a proceeding under G.L., c. 40A, §10, could exempt Edison from the local zoning laws independently of a proceeding under G.L., c. 164, §72, such as was involved in the *Sudbury* cases.

In the present case, Edison sought declaratory relief against local building inspectors, and several towns sought declaratory relief against Edison. The litigation was consolidated in the Superior Court, where the building inspectors were enjoined from enforcing their towns' building codes and the application to enjoin further construction by Edison was denied. Subsequently a single Justice of the Supreme Judicial Court enjoined further construction.

In resolving these conflicts, and, no doubt, hoping to put an end to this entire line of litigation, the Supreme Judicial Court filed a lengthy opinion which held: (1) G.L., c. 164, §72, requires approval for the proposed transmission line from the Department of Public Utilities (despite Justice Reardon's expression to the contrary in the *Framingham* case[6]); (2) the local building codes must give way in this type of case to statewide enforcement by the department under G.L., c. 166, §27, for the sake of uniformity; (3) Edison was not relieved of the necessity to secure street crossing locations under G.L., c. 166, §§21, 22, 27 and 28, despite the fact that it had already acquired most of the other necessary easements, and despite the fact that they might never obtain such approval; (4) the injunction against further construction was dissolved, leaving Edison free to proceed with such construction at the risk of later disapproval under G.L., c. 166. The Court felt that the approval requirements were a problem for the legislature to resolve, since the present statute clearly mandated the conclusion reached by the Court.

The complexities underlying adequate statutory interpretation are well illustrated by the agility and balancing by which the Court settled very difficult questions. The opinion cannot fairly be faulted on this issue, and the Court's wending of its way through complex and indefinite legislative history is a fascinating performance by a master in this art. One might suggest that the combination of intricate legislation and scant legislative history — and an ofttimes minimal

3 Town of Sudbury v. Department of Public Utils., 351 Mass. 214, 218 N.E.2d 415 (1966), noted in 1966 Ann. Surv. Mass. Law §17.1.

4 355 Mass. 79, 242 N.E.2d 868 (1968), noted in 1969 Ann. Surv. Mass. Law §11.3.

5 355 Mass. 138, 244 N.E.2d 281 (1969).

6 Id.

effort by the General Court to relate amendments and additions to the parent legislation — has compelled the development of the Court's talent. On the substance of the decision, even if one disagrees with some of the conclusions as a matter of policy, the Court properly leaves the issues to the General Court. It will be interesting to see the legislative result if action by the towns results in denial of the crossing permit needed by Edison to complete the proposed line. Aesthetics has become in many ways a critical issue with the public, and the success of the Storm King litigation has encouraged citizen groups to attack the grant of easements to utilities that create aesthetic as well as safety hazards.

§17.20. Property already in public use. The Supreme Judicial Court has, at least since the leading case of *Higginson v. Treasurer and School House Commissioners of Boston,*[1] consistently held that land appropriated to one public use cannot be diverted to another inconsistent use without the authority being plainly and precisely stated.[2] Despite this well-known rule, however, cases continue to come before the Court on these issues, the principal problem naturally being whether the authority of the agency seeking to take the property meets the tests of explicitness and precision.

In *Town of Brookline v. Metropolitan District Commission,*[3] the town held parkland that the commission sought to take for widening and improvement of the roads presently passing through the parkland. The Court determined that the legislation authorizing the commission to take land was not sufficiently specific as to this tract. The same conclusion was reached in *Abbott v. Commissioners of the County of Dukes County.*[4] In *Abbot* the owners of land near the county airport succeeded in an action of mandamus in preventing the commissioners from acquiring land or easements within the state forest adjoining the airport.

The cases in this area are numerous and generally reconciliable. Presumably they arise because much legislation permits, in general terms, the taking of property in one public use for another use, but does not state explicitly what specific property can be taken. Legislation tends to be drafted in general terms, and the General Court has not yet responded — nor been requested to respond — to the need for specificity in this area. It can also be presumed that some public agencies do not object to the taking of some of their land for other public purposes, even if such taking was not originally authorized. It can be seen, however, from cases similar to *Abbott,* that the remedy of mandamus and increased public interest in the protection of open spaces and parklands will tend to reduce the effect of the acquiescent

§17.20. [1] 212 Mass. 583, 99 N.E. 523 (1912).

[2] See cases noted in 1969 Ann. Surv. Mass. Law §14.24; 1967 id. §11.3; 1965 id. §14.25; 1963 id. §13.15.

[3] 1970 Mass. Adv. Sh. 699, 258 N.E.2d 284.

[4] 1970 Mass. Adv. Sh. 1103, 260 N.E.2d 142.

public official. Clearly then, either more precise legislation must be instigated by agencies seeking to take public land, or a method of determining priorities will have to be devised. An administrative body could well be developed to consider all public interests involved in such a proposed taking, and to then determine the best solution in a particular case. This would provide a much better solution than would any attempts to seek enactment of numerous statutes describing specific properties that can be taken, where the general public interests cannot reasonably be given their due.

§17.21. Expert testimony: Use for subdivision. In *Carlson v. Town of Holden*[1] the plaintiff sought damages for the taking of 15 acres of his land by the town for school purposes. He testified that the best use of this tract was for subdivision purposes, although he had used it for farming purposes himself, and set its value at $75,000. The town in turn called several expert witnesses, one with experience in sanitary engineering and the other a sanitary engineer. They were asked questions based on percolation tests in which they had participated on the tract. Certain questions were excluded by the judge, and the present appeal was taken from these exclusions.

The witness who was a civil engineer with experience in sanitary engineering was asked whether he had an opinion, as a result of his examination of the test holes, as to the suitability of the area for the development of building lots. The question was excluded. The Supreme Court upheld this exclusion since the question went beyond the competency of the witness; he was not qualified to determine the suitability of the lots for residential building.

The sanitary engineer, however, was asked for an opinion in a much more limited area: whether the property where test holes were dug was suitable "for the construction of sewer systems for individual houses." This was clearly within the competence of the witness and bore directly on the issue of the market value of the land. The suitability of the land for sewerage systems relates directly to the land's present value for subdivision and was evidence that a jury could take into account in determining the use to which the land could be put. It was therefore found error to exclude the question.

C. Subdivision Control

§17.22. Right of way: Way designated on plan. Particularly in older subdivisions that were not fully developed when laid out and have not been since developed, ways designated on the recorded plans have never been constructed. Problems derived from this type of situation were involved in the case of *Uliasz v. Gillette*,[1] decided in the 1970 Survey year. In 1913 one Wilbur had a plan recorded for

§17.21. [1] 1970 Mass. Adv. Sh. 1121, 260 N.E.2d 666.

§17.22. [1] 1970 Mass. Adv. Sh. 327, 256 N.E.2d 290.

a large tract that he owned in Pittsfield. The easternmost of the north-south ways was called Sheffield Street. It was crossed at one location by a way called Savoy Street running northwest-southeast. The planned portion of Savoy Street that ran eastward from Sheffield was never developed, since it lead to undeveloped land in other ownership. Over a period of years, the lots directly north and south of this undeveloped way were purchased by the respondent Gillette. In 1958 Gillette executed a deed to a straw to that portion of Savoy Street abutting her property, claiming title to this land by adverse possession. The deed of the same date from the straw back to her contained no reference to the adverse possession claim. From the date of these deeds, the town designated this undeveloped end on Savoy Street as a lot and assessed the respondent Gillette for real estate taxes on it.

In 1962 the petitioners purchased the land abutting the major portion (about seven-eighths) of the Savoy Street extension. This land was never in common ownership with any land owned or claimed by Gillette. The petitioners had access to their land on a public way. They brought the present action, a suit in equity under G.L., c. 231A, for a declaration that the Savoy Street extension was dedicated to public use and that they had the right to travel it between their adjoining land and Sheffield Street. The probate court granted the petitioners' request for the declaration sought, but the decree was reversed by the Supreme Judicial Court.

To reach its result, the Court had to reject a number of contentions made by the petitioners. The claim that the petitioners and their predecessors had obtained a title by prescription over the lot was not supported by sufficient evidence to reach the required open, notorious and adverse use for the prescriptive period. The claim of an easement of necessity was readily rejected, since such an easement can be found only when the properties involved were in common ownership up to the time of their division; thus, such a claim is not available to strangers to the title. It was also clear that, since the petitioners' property had access on a public way, no legal necessity existed for access via Savoy Street.

The petitioners also claimed that the respondent was estopped to deny that the lot was "an easement, right of way and/or thoroughfare for public use" because all deeds in the respondent's chain of title referred to the recorded plan showing the way. The Court noted that a grantor who conveys land by recorded plan upon which a street is shown is estopped to deny the easement of travel over that street for the benefit of the grantee and his successors in title. But, the Court noted, in the instant case, this rule protects only the grantee and her successors in title, not strangers to the title. The right of way is an easement appurtenant, not in gross. The petitioners were strangers to the title, owning no land in the subdivision, and therefore the respondent was not estopped as to them.

The trial judge apparently decided the case on the ground that Wilbur, in the recording of his 1913 subdivision, established Savoy Street as a right of way, thoroughfare, or private way for public use. The Supreme Judicial Court disagreed with this conclusion. The portion of Savoy Street in question was never laid out or established as a public way nor was it ever treated as such by the city. A public way cannot be created by dedication in the Commonwealth,[2] although under certain circumstances a way not formally accepted could be found to be dedicated to public use. Here, however, Wilbur's recording of his plan, and his later conveyances referring to the plan, were totally insufficient to create a public way; creation of a public way requires unequivocal declarations or acts appropriating land to a public use, and surrendering it to the public.[3]

A further claim by petitioners was that the respondent's deeds to a straw and from the straw back to her were null and void. The Court noted that the petitioners had no right to question the title, since title can be contested only by the true owner or a person having a superior right to possession. In turn, however, the Court did refuse to declare that the respondent was owner of the land in question, since there was no indication that all parties entitled to be heard on the issues were before the Court.

The rather extensive summary of the various arguments presented is helpful as reviewing and effectively restating what has been basically established doctrine in the Commonwealth, but of which many seem either forgetful or ignorant. The case does at least serve this valuable pedagogical purpose. It also serves as a reminder that there are a number of older subdivisions throughout the Commonwealth, and that questions concerning various aspects of the original plan will naturally develop as conditions change.

§17.23. Subdivider-provided sewer system: Additional municipal charge. Under the legislative pattern adopted in most municipalities, part of the cost of the installation of sewer systems is assessed against property affected in annual or permanent charges. In *Exeter Realty Corp. v. Town of Bedford*[1] the town had elected to impose a permanent charge. Two separate categories of charges were developed in the by-law, a $5 per front-foot charge when sewer lines are installed by the town and a $2.50 per front foot charge when the sewer lines are installed by developers. Exeter's predecessor as developer, Lido, had agreed to pay the $2.50 per front foot charge as well as to install the sewer system in the subdivision. Exeter, however, refused to pay the charge, and the town denied it occupancy permits for the houses already built and otherwise fully ready for use.

Exeter's claim that the town had exceeded its authority was re-

2 G.L., c. 84, §23, codifying St. 1846, c. 203, §1.
3 Longley v. City of Worcester, 304 Mass. 580, 24 N.E.2d 533 (1939).

§17.23. 1 356 Mass. 399, 252 N.E.2d 885 (1969).

jected by the Supreme Judicial Court. The Court reviewed the pertinent parts of certain 1947 and 1952 special acts under which the town had acted, which acts referred to G.L., c. 83, §§14-18. Sections 14 and 15 make it clear that a town can assess against a lot owner not merely a proportional part of the cost of that sewer but also a proportional part (so far as not already assessed as betterments against other lot owners) of the cost of the main town sewer system through which the local sewer serving the lot discharges. Section 17 reads in part: "[A] town in which . . . common sewers are laid may determine that a person who uses such . . . common sewers in any manner, instead of paying an assessment under section fourteen, shall pay for the permanent privilege of his estate such reasonable amount as . . . selectmen . . . shall determine." The reference to Section 14 makes it clear that Section 17 covers a benefit assessment, not the annual charge alternative authorized by Section 16. The town's by-law therefore was enacted under Section 17.

The Court noted as justifiable the town's by-law assessing the permanent rate for the owner of a lot where the subdivider installed the sewer system, since the sewer service physically immediate to his land was already paid for by the lot owner either directly or indirectly. The Court found that the differential was not improper, recognizing that it is an estimation but not an unreasonable one. One could certainly argue that a fairer division of value could have been developed. However, the range of legislative discretion is substantial when somewhat differing views of the facts support differing types of cost variables. It would seem improbable, though, for a municipality to favor a development bringing new people into the town over owners of older, established homes. Under certain circumstances, a charge such as this, along with other techniques, could discourage development in the assessing community and tend to thrust it into others. However, Bedford has not been nearly so exclusionary as some other of Boston's suburban communities, and the sewer charge differential is thus much less suspect.

Exeter also argued, on the basis of *O'Malley v. Commissioner of Public Works of Boston*,[2] that the $2.50 per front foot charge was really a charge for the cost of connecting a private drain to a main sewer system. The Court noted, however, that *O'Malley* did differentiate between a sewer connection charge and a charge that reflected the value added to land by its being joined to the town's general sewer system. It held that the present case involved the latter type of charge.

§17.24. Public way: Prescription. In *Town of Boxborough v. Joatham Spring Realty Trust*[1] the town sought a declaration of the

2 340 Mass. 542, 165 N.E.2d 113 (1960), noted in 1960 Ann. Surv. Mass. Law §§1.9, 18.7.

§17.24. 1 356 Mass. 487, 253 N.E.2d 335 (1969).

rights, if any, of the public to the use of the way running over land of the trust. The appellant, owner of land adjoining that of the trust, had access to her land over the 1240 foot way in issue. The lower court had confirmed a master's report and decreed that no part of the way in question was a public way but that a right of way for the benefit of the appellant landowner for residential and farming purposes did exist across the land of the trust. This decree was affirmed by the Supreme Judicial Court.

Before a way can be found to be established for the benefit of the public by prescription, use by the general public as a public right must be proven in addition to both the open, notorious, and hostile nature of the acts relied upon and the 20-year prescriptive period.[2] On the facts of this case, public use was infrequent and for only such limited occasional purposes as visiting a spring, hauling wood from back land, or hunting. For over 20 years the town listed the road as a public way and performed road maintenance functions thereon. The Court noted that evidence of maintenance by the town is at best incidental in attempting to prove a public way by dedication; the crucial issue involves the extensiveness of the use by the general public.[3] The Court recognized the doctrine expressed by Justice Holmes in *Taft v. Commonwealth*[4] — that frequency of use in smaller, less populated communities is best estimated by the nature of the area served — but rejected the application on these facts, wherein only the appellant and her predecessors in title had with any consistency and frequency used the way.

§17.25. Ownership of land subdivided. *Kuklinska v. Planning Board of Wakefield*[1] was one of three companion cases decided in the same opinion. A number of issues were involved, but the major subdivision control issue involved the requirement that the applicant for subdivision approval own all the land being subdivided. The issue arose because part of the land subdivided was determined to be the land of a petitioner. Under G.L., c. 41, §81L, a subdivision applicant is defined as an "owner or his agent." Section 81M requires that the planning board adopt "reasonable rules and regulations." The town has a rule requiring that the applicant own all the land included in the subdivision. Once it was determined that the boundary had been improperly determined and that part of the land covered by the plan was not owned by the applicant, the board's approval had to be annulled. The plan was sent back to the board for action.

One of the companion cases involved an additional subdivision control issue. An owner of land abutting the subdivision claimed the

[2] The Court cited Bullukian v. Franklin, 248 Mass. 151, 142 N.E. 804 (1924), for this proposition.

[3] Carson v. Brady, 329 Mass. 36, 106 N.E.2d 1 (1952).

[4] 158 Mass. 526, 552, 33 N.E. 1046, 1050 (1893).

§17.25. [1] 1970 Mass. Adv. Sh. 355, 256 N.E.2d 601.

plan did not provide, as the board's regulations required, for the projection of subdivision streets into adjoining property. The defense was that the adjoining property of this petitioner had other ready access to public ways, which holding the board had adopted. The master below stated that the board had so found, but the Supreme Judicial Court noted that the court below (here the master) had to make its own finding on this issue and that it was not enough merely to repeat the board's determination.